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In the Supreme Court of the United States

OCTOBER TERM, 1966

Case No. 1219

BEALL PIPE AND TANK CORPORATION, a corporation,

Petitioner,

v.

SHELL OIL COMPANY, a corporation,

Respondent.

RESPONDENT'S REPLY BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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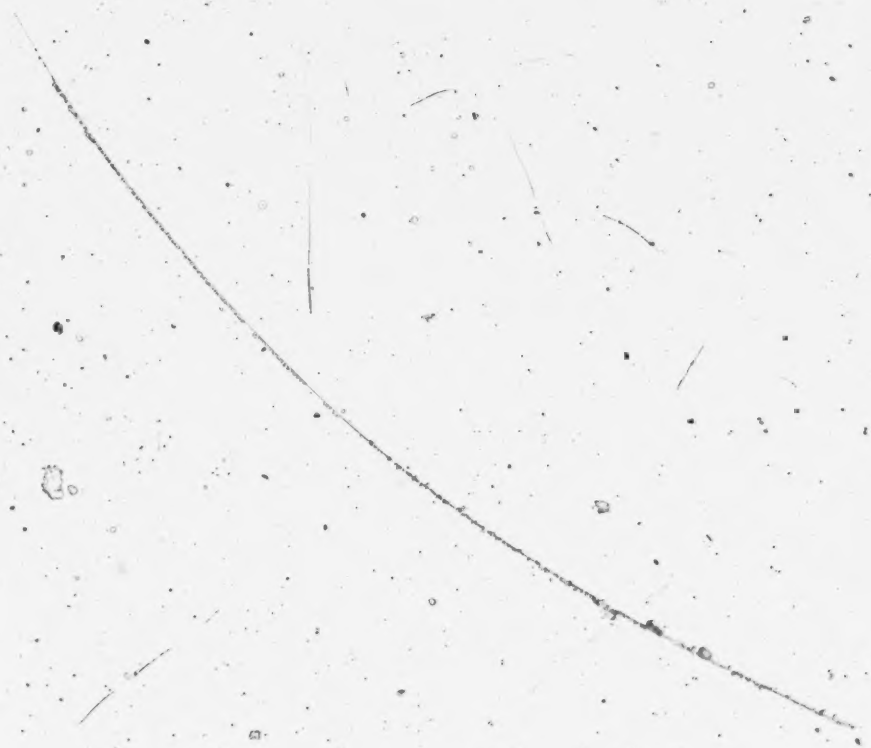

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STATEMENT OF THE CASE

The Statement of the Case by petitioner omits several important elements:

1. Petitioner says (Petition, p. 3) that "for all practical purposes, plaintiff's production methods have not been changed in the past 30 years." This is false in detail. Without contradiction it was proved that Beall originally set up a vat, for dipping smooth pipe in asphalt, in 1924. At that time, and until 1952,

Beall had a capacity for making smooth pipe at the rate of 300-500 feet per shift. Between 1952 and 1959 (when the detachment of asphalt began to occur), Beall increased its pipe-making capacity by a factor of 60-100. Beall had a capacity by 1958 of 30,000 feet per shift. It produced and dipped pipe "to order," and in the late 1950's the asphalt-dipping department got 2-3 weeks behind the orders. The pipe-making capacity tripled in 1958. Beall never enhanced or improved its vat for dipping pipe. It always used the 1924 model of dipping vat. There was veritable demonstrative evidence that this huge increase in pipe production overwhelmed the dipping facilities, which were the bottleneck in the flow of production (Tr. 219-220, 333, 1195, 1931-1932).

Moreover, in a process that requires close thermal control, Beall's temperature control in the all-important "preheat oven" broke and was not repaired, and the whole practice of the pipe-dipping department similarly broke down. These matters are covered in Appellee's Brief to the Court of Appeals (pp. 14-24).[1] As noted there, Beall abandoned its original, successful, formal procedures in the torrent of pipe production and permitted the control of the entire dipping operation to degenerate to the random practices of untrained individual operators.

2. Petitioner says (Petition, p. 4) that it "notified defendant of the disbonding problem," which is a part of the notice requirement for a claim of breach

[1] Hereinafter referred to as Appellee's Brief.

of warranty under the Uniform Sales Act applicable to this case. The notification was too late and proof of the notice was insufficient, as a matter of law. See Appellee's Brief, p. 49, and see discussion of this point by the District Court below, at Petition, App. B, pp. 49-56.

3. Petitioner claims (Petition, p. 4) that it "contended and offered proof that the disbonding failures resulted from an imbalance of the chemical composition of the asphalt . . . purchased from defendant. . . ." This claim will be discussed below. Suffice it to say here that there was a total failure of proof on this subject.

SUMMARY OF ARGUMENT

1. There is no real "Federal question" apparent in the record, or in the result of the actions of the courts below. The "Federal question" asserted by the Petitioner is essentially a request that this Court reverse the lower courts upon a re-appraisal of the evidence, not on any genuine legal issue.
2. Petitioner ostensibly frames the "Federal question" in this manner:
   (a) The grounds for a judgment n.o.v. (i.e., whether there is any "substantial evidence" to support the verdict) are more strictly applied by the Oregon state courts than they were by the federal courts below.
   (b) Because of this difference in strictness, the

federal courts below must have been applying some covert "Federal standard" at variance with the alleged "state standards"; hence the "Federal standard" violates the precepts of *Erie* v. *Tompkins*.

(c) This disease infects several of the Circuits, while other Circuits follow the "state standards" for granting judgments n.o.v.

3. The federal courts below, in fact and in explicit terms, applied exactly the same standards to the substantiality of petitioner's evidence, in granting a judgment n.o.v., as the standards announced and applied by the state courts of Oregon. Moreover, this same "standard" of sufficiency is apparently the uniform model applied by substantially all other state and federal courts, regardless of what adjectives are used to describe the process.

4. The Petition contains nothing more than the claim that the lower courts gave insufficient credit to petitioner's evidence, not that they applied the wrong standard. This Court should not entertain jurisdiction for the sole purpose of reviewing the nuances of evidence.

5. In order to show that the courts below must have applied a loose, "federal" standard to the sufficiency of petitioner's evidence, and granted a judgment n.o.v. to respondent simply because they disagreed with the verdict, the Petition contains the following errors:

(a) The record of evidence is misread.

(b) The statements of the courts below are obviously misinterpreted.

(c) Statements relating to the granting of a new trial are transposed into statements relating to the stiffer matter of granting a judgment n.o.v.

6. Petitioner asserts an identity between the burden of proof and the sufficiency of evidence on a motion for judgment n.o.v. This claim is without support in authority or logic.

7. In attacking the alternative orders of the District Court below—the granting of a new trial—petitioner erroneously claims that there is a conflict among the Circuits, involving the doctrine of *Erie* v. *Tompkins*. This claim is totally without support.

REASONS FOR NOT GRANTING THE WRIT

Introductory comment

The opinion of the Court of Appeals below was based upon the factual paucity of petitioner's case. In effect, the Court of Appeals was satisfied that the law required no further analysis. And, indeed, where the issue is a judgment n.o.v. or a new trial, as in our case, the inquiry must be basically factual. (See Petition, App. C, p. 62). The solitary question is whether there is substantial apposite evidence to support the verdict.

An examination of the facts alone convinced the

Court of Appeals that the District Court was correct in rendering judgment for the respondent, Shell. If the decision of the Court of Appeals or the District Court is valid either on the law or the facts, this Court should not re-examine the decisions below. See *Alpha S.S. Corporation* v. *Cain*, 281 U.S. 642, 50 S. Ct. 443, 74 L. Ed. 1086 (1930). This Court traditionally has accepted the interpretation of the facts and the law rendered in the concurrent decisions of two lower courts. *The Lindseed King*, 285 U.S. 502, 52 S. Ct. 450, 76 L. Ed. 903 (1932). The substantive legal questions in our case, which the Court of Appeals found unnecessary to analyze, were of local law in the main, and on such questions this court ordinarily accepts the decisions of the lower courts. *Byrd* v. *Blueridge World Electric Cooperative*, 356 U.S. 525, 529-530, 78 S. Ct. 893, 897, 2 L. Ed. 2d 953 (1958).

Our case presents no extraordinary legal issues. The issue presented to the District Court, and to the Court of Appeals, was the sufficiency of the evidence advanced at trial. That issue should not be reviewed in the United States Supreme Court. It was the staple business of Courts of Appeals. The district judge undertook the great chore of reviewing the evidence, and he found it insufficient to make out a case for the plaintiff. The Court of Appeals repeated the same function and made the same finding. This court has said that it does not have that function nor that aptitude. *Dick* v. *New York Life Insurance Company*, 359 U.S. 437, 454, 461; 79 S. Ct. 921, 931, 935, 3 L. Ed. 2d 935 (1959).

Petitioner concedes that there is no federal constitutional question involved in our case. The questions are factual, as the Petition illustrates. This court most recently has held that unless a constitutional question is involved the decisions of both the district court and a court of appeals, agreeing upon the result, will not be reviewed, for "this court possesses no empirical expertise to set against the careful and reasonable conclusions of lower courts on purely factual issues." *Berenyi* v. *District Director*, 384 U.S. 903, 87 S. Ct. 666, 670, 16 L. Ed. 2d 357 (1967).

I

A. No important question of federal law was decided by either of the courts below, and no question of federal law remains unsettled by this court, as applied to this case.

Although petitioner asserts that the Supreme Court of the State of Oregon has formulated strict standards for granting or denying motions for a judgment notwithstanding the verdict, and although petitioner obliquely asserts, without any reference to authority, that federal courts have formulated loose standards for granting or denying motions for judgment n.o.v., in fact the Oregon standards applicable to this case are the same as the test employed by the courts below.

Petitioner claims that the "court below has implicitly, if not explicitly, held that a federal standard applies," in determining whether the plaintiff's evi-

dence is sufficient to escape a judgment n.o.v. (Petition, p. 5). This assertion is wholly untenable. The District Court, in its opinion explicitly states the standard employed:

> "The Court is mindful that the test for the propriety of judgment notwithstanding the verdict is whether in this case, disregarding conflicting evidence in favor of the defendant and giving to plaintiff's evidence all the value to which it is reasonably entitled, therein indulging in every reasonable inference favorable to plaintiff, there is evidence of sufficient substantiality and probative value to support the verdict in favor of plaintiff." (Petition, App. B, p. 22).

The opinion is studded with repeated references to the absence of "substantial evidence" or "any" evidence.

Compare this test with the statement of the "Oregon standard" contained in the quotation from *Fish* v. *Southern Pacific Co.* on page 6 of the Petition. No lawyer, however hard pressed for inspiration, could discern even a shade of real difference between the "Oregon" rule and the standard applied by the District Court below.

Perhaps Petitioner is claiming that the Court of Appeals applied some "Federal" standard at odds with the "Oregon" standard. Not so. The Court of Appeals merely agreed with the District Court: "A study of the record convinces us that insufficiency of the evidence is such as to support judgment n.o.v. as well as new trial." (Petition, App. C, p. 62.)

The Oregon Supreme Court applies the rule that if any essential material issue is not supported by competent evidence, then a directed verdict or a subsequent judgment n.o.v. must be granted. *Phillips* v. *Colfax Company, Inc.*, 195 Or. 285, 292, 243 P.2d 276, 245 P.2d 898 (1952). The federal courts apply exactly the same rule: If there is a lack of evidence to prove any necessary element of the plaintiff's case a verdict should be directed against the plaintiff. *Hawley* v. *Alaska Steam Ship Co.*, 236 F.2d 307, 309 (9th Cir., 1956). The standards of the Oregon court and the standards of the federal courts agree that if a plaintiff's recovery at best relies upon one of several possible causes of harm to the plaintiff, then a verdict must be directed against that plaintiff. *Spain* v. *Oregon-Washington R & N Co.*, 78 Or. 355, 369, 153 P. 470, 475 (1915); *Davis* v. *Firestone Tire & Rubber Company*, 196 F. Supp. 407, 411-412 (N.D. Cal., 1961). This court agrees: *Galloway* v. *United States*, 319 U.S. 372, 395, 63 S. Ct. 1077, 1089, 87 L. Ed. 1458 (1943); *Moore* v. *Chesapeake & O. Ry. Co.*, 340 U.S. 573, 578, 71 S. Ct. 428, 430, 95 L. Ed. 547 (1951). Phrased otherwise by this court, if evidence is consistent either with a hypothesis of liability or one of non-liability, the proof has established neither. Evidence relating to any crucial issue of fact must be based upon more than mere conjecture, speculation or surmise. The evidence must rise above mere alternative possibilities, and the evidence upon which reliance is placed must rise to the dignity of suggesting and supporting a reasonable probability. *Gunning* v. *Cool-*

ey, 81 U.S. 90, 93, 50 S. Ct. 231, 233, 74 L. Ed. 720 (1930); *Galloway* v. *United States*, supra. See also *Commercial Standard Insurance Company* v. *Feaster*, 259 F.2d 210, 212 (10th Cir., 1958).

The Oregon and federal standards agree that the evidence which a plaintiff must produce at trial to support each material allegation and issue must be competent evidence. *Johnson* v. *Hoffman, et al*, 132 Or. 46, 59, 284 P. 567 (1930). Thus tenuous, conjectural, and speculative evidence cannot withstand a motion for a directed verdict or judgment n.o.v. *Galloway* v. *United States*, supra; *Moore* v. *Chesapeake & O. Ry*, supra.

Petitioner cites the Oregon case of *Fish* v. *Southern Pacific Company*, 173 Or. 294, 301, 143 P.2d 917, 920, 145 P.2d 991 (1944). This case (like dozens of other Oregon decisions) holds that the standard is whether there was "substantial evidence" to support the verdict. That remains the test in Oregon. See *Rossman* v. *Forman*, 224 Or. 610, 611, 356 P.2d 430 (1960). And that is the federal test too: *Ford Motor Company* v. *J. M. McDavid*, 259 F.2d 261, 266 (4th Cir., 1959); cert. den. 358 U.S. 908, 79 S. Ct. 234, 3 L. Ed. 2d 229 (1958): *Lovas* v. *General Motors Corp.*, 212 F.2d 805, 807 (6th Cir. 1954); *Reece et al* v. *Capital Transit Company*, 230 F.2d 824 (D.C. Cir., 1956). It was the test expressly applied in the present case by the District Court and adopted by the Court of Appeals. The Court of Appeals for the Ninth Circuit customarily applies the state standard of what

is "substantial evidence": *Union Pacific Railroad Co.* v. *Munoz*, 326 F.2d 248 (9th Cir., 1964). Indeed, to label the test a "Federal standard" is essentially superfluous, for there is no real disagreement between the state and federal courts in their application of this old and common principle.

This court correctly observed in *Galloway* v. *United States*, supra, that distinctions between the adjectives used in the general formulae (e.g. "substantial", "any," etc. evidence) do not aid legal understanding. Thus "whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked. The mere difference in labels used to describe this standard . . . cannot amount to a departure from the 'rules of common law' which the [Seventh] Amendment requires to be followed."

Because both Oregon and federal courts apply the test of "substantial evidence" to determine the granting of a directed verdict or judgment n.o.v., it is appropriate to define "substantial evidence." For our purposes, substantial evidence is simply sufficient evidence to support the allegations material to the plaintiff's claims for relief. See *Carlson* v. *Wheeler-Hallock Co.*, 171 Or. 349, 355, 137 P.2d 1001 (1943). This court has defined substantial evidence: "It means such evidence as a reasonable mind might accept as adequate to support a conclusion." *Consoli-*

dated Edison Co. v. *National Labor Relations Board*, 305 U.S. 197, 229, 59 S. Ct. 206, 217, 83 L. Ed. 126 (1938). The Oregon federal district court and the Oregon state supreme court agree; see *Henzel et al* v. *Cameron et al*, 228 Or. 452, 464, 365 P.2d 498 (1961); *Johnson* v. *Flemming*, 188 F. Supp. 447, 449 (D. Or. 1960). "Substantial evidence" is simply evidence that is "reasonable, credible, and of solid value." *Union Pacific Railroad Company* v. *Munoz*, 326 F.2d 248, 250 (9th Cir., 1964). This legal phrase is a shorthand reference to the quantum of intelligent information upon which reasonable people could make reasonable decisions. It is the law's bulwark against sympathy, bias, whimsy, caprice and speculation.

In an attempt to eke out the claim that the District Court applied a standard more rigorous than the "Oregon" standard, despite the plain statement of the District Court to the contrary, Petitioner takes a statement of the District Court out of context. The Petitioner quotes District Judge Swigert, and implies that the quoted comments furnished a spurious standard for the granting of a judgment n.o.v. (Petition, p. 6). Even assuming that these quoted comments were more than mere grace notes, the fact is that they are proper and appropriate remarks directed to the granting of a *new trial*, to which the context of the District Court's opinion referred. Judge Swigert granted a new trial, and the Court of Appeals affirmed. The grounds for a new trial of course differ from those for a judgment n.o.v.: one proper ground for a new trial, of course, is the conviction of a trial

judge that a serious miscarriage of justice otherwise would occur.

We now turn to a brief inspection of the evidence, as it relates to the grounds asserted for the Petition. To avoid any subtleties or confusion, it is safe to introduce this factual discussion in clear terms:

1. The Oregon law requires "substantial evidence" to support a judgment of nonsuit, a directed verdict or a judgment *non obstante veredicto.*

2. The "Federal" rule on the right to a judgment n.o.v. is identical: "substantial evidence" again.

3. Judge Swigert of the District Court granted a judgment n.o.v. because (applying a strict paraphrase of the Oregon rule) of a lack of "substantial evidence" to support the verdict. Referring to the text of the opinion in the Petition, Appendix B, Judge Swigert refered to this standard on pages 21, 22, 23, 30, 37, 39, and elsewhere followed it by clear implication.

Petitioner's attack on Judge Swigert's comment that the verdict, if allowed to stand, would be "unfair . . . a miscarriage of justice" is misdirected. These comments related to Judge Swigert's order for a new trial in the alternative. They were a proper statement of grounds for a new trial. Petitioner wrongly implies that they were the grounds for the judgment n.o.v.

4. The Court of Appeals applied the same Federal-Oregon standard in its opinion: "A study of the

record convinces us that insufficiency of the evidence is such as to support judgment n.o.v. as well as new trial." (Petition, App. C, p. 62)

5. If the Courts below (or either of them, for that matter) applied the same, unified Oregon-Federal standard—a lack of "substantial evidence"—where is there any federal question? Where is there any basis for the reconciliation or settlement of a supposed conflict between Circuits as to whether a state or a federal standard should be applied? It would be an academic exercise to issue dicta on the subject here.

Although we now must examine the evidence briefly, there is no practical substitute for a reading of the Brief of the Appellee, Shell, in the Court of Appeals. The supporting technical data is set forth there in detail, and it would be inefficient to repeat it all here. We will discuss only the points raised in the Petition.

A preliminary remark: The Petition, and petitioner's whole case, rest inevitably upon the testimony of the two "experts," Dr. Marian and Dr. Traxler. On pages 7 and 8 of the Petition appears a list of the particular items which petitioner, in effect, claims to be "substantial" evidence to support the verdict. We will discuss items C, D, and E (Petition, p. 8), but any "substantial evidence" of liability upon Shell could have come only from the testimony of Marian and Traxler, for only they purported (at times) to testify that the Shell asphalt was defective.

i. Drs. Marian and Traxler.

Petitioner claims (Item A, Petition, p. 7) that Drs. Traxler and Marian "testified expressly that in their expert opinion the defendant's product was defective by reason of faulty chemical composition. The trial court concluded that these same experts found that the defendant's material was the best."

First, the trial court did not conclude that these experts found the defendant's material was the best. Petitioner's claim to the contrary is bogus. A reference to the remarks of the trial judge in the Petition, (Appendix B, p. 29) directly controverts the claim. What the trial court said was that the Doctors' testimony, to the effect that the Shell asphalt was of poor quality, failed to rise to the level of "substantial evidence" because of internal inconsistencies in their testimony. The petitioner has misstated the matter. The error is aggravated by petitioner's failure to read pages 29-30 of its own Petition.

Second, the testimony of these experts was utterly destroyed on cross-examination. Petitioner cannot claim that the testimony amounts to any more than its net, deflated effect; nor that its effect as "substantial evidence" amounts to any more than Marion's and Traxler's testimony taken as a whole, even indulging every favorable inference for Petitioner.

As Judge Swigert noted (Petition, App. B, pp. 30-32) Dr. Traxler's testimony completely disintegrated in one rather dramatic exchange, reported in pages 1483-1490 of the Transcript. Summarized, Dr. Traxler admitted on cross-examination:

a. According to his chemical analysis of the three types of asphalt that he tested (to make a comparison of properties), the Shell asphalt had the *best initial qualities* from the standpoint of adhesion (which was the issue of the case) (Tr. 1489-1490). This chemical analysis is the whole mainstay of Petitioner's case.

b. *However*, Dr. Traxler testified it was his opinion that despite its superior initial qualities, the Shell asphalt would deteriorate, and lose its adhesion, faster than the other asphalts, because of chemical changes. This is all that petitioner mentions (App. D, I, p. 67 of the Petition), concealing the barrage in which Dr. Traxler fled the field after a painful surrender.

c. It turned out that *the only reason* he claimed that this deterioration would occur was based on Traxler's inspection of the *outside* coating of a *single pipe* a day before he was cross-examined. He felt that *all* the Shell asphalt supplied to Beall was unstable because the outer coating of that *one pipe* was hardened. There were miles of pipes available for his inspection (Tr. 1488). The *inside* coating of that same pipe was perfect—and it was laid on at the same time, in the same dip, as the outside coat. When shown this —and he had not even looked at it before—he collapsed. It utterly defied his opinion; it proved conclusively that he was wrong.

d. Finally, as an honorable man, he admitted that he *did not know*—had no explanation, no opinion—

why the outside of that one pipe had become hardened. His whole testimony was exposed as a spurious guess, and he retreated to the concession that the Shell asphalt was originally the best of all he tested, and that he had no rational basis for his projection that Shell's asphalt must be more susceptible to aging and deterioration. He confessed that except for the condition of that outer coating of that one pipe he had no reason to suppose that Shell would not remain forever superior to the other asphalts. We well may wonder about, and a court may reject as inherently incredible, the testimony of a scientist, investigating phenomena relating to the inner lining of a pipe, who neglects to look there, but looks only at the outside of one pipe—which he concedes was probably damaged by soil conditions.

Is that "substantial evidence" of a defect in the Shell asphalt?

As for Dr. Marian, he too claimed that a chemical analysis (never used for this type of product by anyone else, and not even consistent with the procedures and controls established by its originator, one Roseler) showed the Shell asphalt to be unstable. He also claimed that the Shell asphalt showed "incipient" aging (deterioration) in laboratory performance tests. To support Marian's claims he introduced graphic data based on his chemical analyses. This evidence is digested and evaluated in Appellee's Brief, pp. 7-13. That evidence was so flimsy and specious, so riddled with intrinsic conflicts on the face of it that it could

not rise to the level of "substantial evidence." Marian was, among other things, purporting to run analyses (by his own admission) on asphalt samples that were so contaminated and deteriorated that they were "not even asphalt any more" (Tr. 2077, 2100). On the only tests in which he used authentic virgin asphalt, Shell was found to be greatly superior to the comparison product (Tr. 2131, 2141, 2142, 2146, 2147).

Is that substantial evidence of a defect in the Shell product?

ii. *Experimental test results (Item B, p. 7 and App. D, II, p. 68 of the Petition).*

This part of the Petition could have been written only by someone who never read the record. It is astounding. We (Shell) are accused of an untruth in claiming that Dr. Marian never produced an adhesion failure in 2½ years of testing the Shell asphalt. With considerable relish we cite the record: Transcript, p. 2152. If this does not specifically, directly and wholly support our version we are unable to read the language. Marian never managed to make a pipe coated with Shell asphalt fail, either (Tr. 1041).

It should also be noted that one of the things Marian was doing to the asphalt, in an attempt to make it lose its adhesion, was subjecting it to a "weatherometer" test—a form of torture testing under abusive simulated extreme exposure conditions (Tr. 1033).

All he ever got was some surface checking of the

asphalt (Traxler, Tr. 1434-1435). Marian conceded that he could not pry the asphalt off one of his test plates (undoubtedly the worst he could find) by any means—it was adhering solidly (Tr. 2087).

If it be recalled that these savants were attempting to explain a phenomenon—the detachment of asphalt in sheets from the insides of pipes—which in many cases occurred within several weeks, their testimony becomes patently incredible. Good adhesion after 2½ years of this hostile testing, on everything that was tried, simply gives the lie to their suppositions. There is an obvious explanation for the failures: All experts freely conceded that if petitioner failed to exercise proper temperature controls in pipe-dipping (and there was overwhelming evidence of that), exactly this sort of failure could be expected with the best of asphalts (Tr. 2151, 2097).

The basic significance of this failure of proof is that there was insufficient "substantial evidence" of any defect to support the verdict.

Petitioner seriously misconstrues the principle that actuated the District Judge below in granting a judgment n.o.v. According to petitioner, Judge Swigert acted on the basis of a disagreement with the jury on conflicting evidence. This is not so. The Judge clearly stated, several times, that the testimony of the witnesses, viewed most favorably for the plaintiff and disregarding conflicts for the defendant, failed to provide "substantial evidence"—the Oregon and Federal standard—of any negligence or defect in the

manufacture of the product. See Petition, App. B, pp. 22-23.

Other factual misapprehensions of the Petitioner should be noted:

iii. *Arithmetic revisited* (*Item C, Petition p.* 8)

As we read the record (Tr. 1879), Beall said it dipped about 6,200,000 feet of pipe in Witco asphalt between *1957* and 1963, of which 579,230 feet obviously lost its coating of asphalt, and another 330,000 feet (Beall's response was ambiguous) may have suffered the same problem. The Interrogatory referred to in this part of the Transcript asked for the footage dipped since *1959* (when Beall's pipe began to peel), and the claims for detachment since *1959.* Applying an average over that period produces the 20% figure. The tricky arithmetic was petitioner's idea, not ours. Petitioner supplied pipe production footage for an extra two years, which would improve petitioner's batting average, before Beall's dipping methods became so sloppy that the asphalt began to peel. Petitioner dipped about 100,000 feet of Witco pipe per month during the 1957-1959 period (favoring Beall, since the production is highly seasonal). The plant was out of production (fire) from June, 1961, to Spring, 1963. Therefore, from January 1, 1959, about 3,000,000 feet of Witco asphalt-coated pipe was dipped of which either 579,000 or 919,000 feet failed. Favoring Beall, using the former figure yields about a 20% failure ratio.

Why quibble? Simply because Beall says that the trial court made an erroneous "credibility judgment" of the testimony on this item—*and the only evidence on it came from Beall itself*. And the trial judge *believed it.*

iv. *Culvert pipe* (*Item D, p. 8 and Item IV, App. D, p. 75 of the Petition*).

Petitioner claims that the courts below disregarded the evidence of "plaintiff's lay witnesses and expert witnesses" to the effect that the defendant's material failed to adhere to *culvert* pipe as well as to smooth pipe. The retort to this is that there was no such evidence. We repeat: There was no such evidence. The only evidence was directly to the contrary, and it came from Beall's sales manager.

Indeed, the trial judge is almost slandered by this absurd assertion. What did Judge Swigert actually say about this? "As stated by Wilkins, Beall's sales Manager: 'It was satisfactory on culvert pipe, or at least I heard no claims.' (Tr. p. 457)" Petition, App. B, p. 26. That is exactly what Wilkins said, and it is the only evidence on culvert failures.

Where is there any evidence to the contrary, evidence that the asphalt failed on culvert pipe? The evidence, indeed, is that Beall continued to use Shell asphalt for culvert long after it stopped using it for smooth pipe—until fire destroyed their separate culvert dipping vat. (Exs. 110A, 318-351, 110A, 466-482, 110A, 113-153).

This matter was specifically inquired into orally by the Court of Appeals, and Petitioner could not give any accurate references to evidence of culvert failure. What petitioner did do on this subject was to make reference to various samples of asphalt taken from culvert pipes in service—but it will be noted that these references (Exs. 50-50f) omit, very significantly, any notation of "date of failure." There was not one single shred of testimony that anyone had observed a detachment of asphalt from culvert pipe in service.

Petitioner refers (Petition, p. 75) to "unequivocal testimony that there were culvert failures." This verges on irresponsibility, and it is an insult to the intelligence of this Court. Read, as petitioner requests, pages 54-55 of petitioner's opening brief to the Court of Appeals. A witness related a third-hand statement of a remark to the effect that the asphalt "didn't seem to be what it used to be; it was sticky." What evidence is this of *culvert failures? Of the loss of asphalt from culverts?*

v. *Witco pipe* (*Item E, p. 8 and Item V, App. D, p. 75 of the Petition*).

This claim is really haunting. It chastises Shell for having made an argument; it assumes that the argument was so seductive that it robbed both courts below of their discrimination; and it claims that in the argument we misrepresented the evidence. Petitioner is saved from being meretricious by being fey.

The Court of Appeals never mentioned the subject, which involved the direct testimony of a Witco man to the effect that a Beall executive said that Beall was not going to buy any more Witco asphalt because it was coming off the pipes. This conversation was shortly before Beall started using Shell asphalt. The evidence bore on the issues of warranty reliance, and on Beall's claim that Shell was warranted to be "as good as" Witco. (It was as good.)

What did we tell Judge Swigert in oral argument? "The evidence of Irving Berger was to the effect that he talked with Franklin Beall in September of 1959. Franklin Beall told him they weren't going to buy any more (Witco) because it was coming off the pipes, seven or eight of the last major orders that they had." (Tr. of Argument, December, 1964, p. 39). Petitioner claims that this mis-stated the evidence.

What did Berger testify? Tr. 1215-1216 makes petitioner's reproaches as surly as they are improper on the record: Berger testified that Beall said they were having an "adhesion problem," the asphalt was "falling off the pipe" on "the last seven out of the last eight major jobs" on which Beall was using Witco; and that Beall "presented me with a piece of coating which failed to adhere to one of their pipe jobs, and handed this to me."

And what did Judge Swigert say about this? He merely noted that there was strong evidence that Beall knew of Witco failures before Beall bought Shell asphalt, and that Beall denied this (Petition, App. B;

p. 46). No possible inference could be drawn that this remark of the District Court became a basis for the decisions below. The District Judge was clearly summarizing the evidence, and the Court of Appeals ignored this point.

The petitioner's references to pages 17, 28 and 38 of Appellee's Brief are equally silly. What was said there corresponds exactly to the evidence, supported by the references cited there, including petitioner's own sworn evidence.

B. There is no conflict between the decisions in this case below and the rules respecting burden of proof.

Petitioner asserts that the law relating to the "burden of proof" is identical to the law governing the sufficiency of the evidence to escape a judgment n.o.v. Petitioner cites no authority, and there must be none because no competent court would so aimlessly confuse two such different elements as evidence producing and motion making.

The element of "burden of proof" comprehends *who* must prove *what* to support his claim or defense. The element of "sufficiency of the evidence" is concerned only with *how much* of the appropriate evidence one must prove in order to avoid the malady of speculation which is cured by a judgment n.o.v.

The burden of proof is regulated by state law under *Erie*, because "what" is of course a substantive matter. The sufficiency of the evidence, the "how much" of the "what," is primarily a question ad-

dressed to the good sense of the trial court, which will refer to some adjective like "substantial." Federal courts and state courts—at least in Oregon, and in this case—follow the same principle and apparently employ the same mental process.

There was no forum shopping involved in this case. Petitioner's chosen forum (the District of Oregon) properly applied Oregon's substantive law and the federal court's procedural law. This application of the law was never challenged by petitioner below.

C. There is no conflict among the federal courts on the standards to apply in granting or denying a motion for a judgment n.o.v., based on the sufficiency of the evidence, applicable in this case.

The only issue upon which the petitioner can create jurisdiction in this Court is the specious contention that the federal courts in our case applied the wrong standard in determining that the plaintiff's proof was insufficient. The courts below did no such thing, as demonstrated above.

The spectre which petitioner raises before this Court, so that it will assume jurisdiction of this case, was never raised by petitioner below, in the district court or in the court of appeals. Now the petitioner asserts that a "state standard" should be applied, in contradistinction to an assumed different standard under federal law. However, this is a switch in assertions and tactics by petitioner; before the Court of Appeals below the petitioner urged the application of only "federal standards." The petitioner urged the

Court of Appeals for the Ninth Circuit to adopt the standards of the Court of Appeals for the Third Circuit, discussed in *Lind* v. *Schenley Industries Inc.*, 278 F.2d 79, 92 (3rd Cir., 1960), cert. den. 364 U.S. 935, 81 S. Ct. 58, 5 L. Ed. 2d 60 (1960). (See appellant's opening brief below, p. 14). And the *Lind* case makes no reference to applying a "state standard," makes no reference to any so-called distinction between state standards and federal standards. The petitioner also urged the Court of Appeals below to adopt a standard which had to be "federal," because it was applied in a federal criminal case, *Barnard* v. *United States*, 342 F.2d 309, 326 (9th Cir., 1965). See the actual test applied in *Barnard, supra*, 342 F.2d at 317. The only other authority cited by the petitioner to the Court of Appeals below was *Moist-Cold Refrigerator Co., Inc.* v. *Lou Johnson Co. Inc. et al*, 249 F.2d 246 (9th Cir., 1957), cert. den. 356 U.S. 968, 78 S. Ct. 1008, 2 L. Ed. 2d 1074 (1958), which applies the old faithful "substantial evidence" test. 249 F.2d at 256. (See appellant's opening brief below, p. 15.)

If one actually reads the cases cited by petitioner for its assertion that there is a conflict among the federal courts, the "conflict" evaporates. Petitioner asserts that the Sixth, Seventh and Eighth Circuits have held that the federal court must defer to state law in making the determination of what is the standard to be applied on a judgment n.o.v. motion, and petitioner asserts that the Fourth, Fifth, and Ninth Circuits have ruled to the contrary. In fact, the cases cited from the Sixth, Seventh and Eighth Circuits

simply hold that the state substantive law on what are the elements of the plaintiffs' respective cases must control in a diversity case, under *Erie*. The Fourth, Fifth, and Ninth Circuits do not disagree with that proposition. Cases from those circuits which adhere to that proposition are legion and need no citation of authority.

The cases cited by petitioner from the Fourth, Fifth, and Ninth Circuits simply state that a motion for a judgment notwithstanding the verdict raises the question of whether the evidence was sufficient, and that question is raised pursuant to Rule 50(b) of the Federal Rules of Civil Procedure.

In brief, the test (substantiality) is the same in state or federal courts, for the purposes of the instant case. The rights of the parties are exactly equivalent, but the procedural references may vary. A case from the 6th Circuit, one of petitioner's asserted "state standard" jurisdictions, demonstrates the point. In *Lovas* v. *General Motors Corp.*, 212 F.2d 805, 807 (6th Cir., 1954) the court held that sufficiency of evidence to take a case to the jury is a question of law for the trial judge, applying the state law under *Erie* for the substantive elements of *what* was to be proved. The court went on to say that in both state and federal law the principles to be applied in determining the necessary minimum sufficiency—the how much—of evidence are well settled: In both state and federal law there is a preliminary question for the judge whether there is any substantial evidence upon which a jury properly can proceed to find a verdict for the

plaintiff upon whom the burden of proof is imposed (by local law); evidence of no probative value is not enough to avoid granting a directed verdict; if the evidence on an issue is so overwhelming against the plaintiff's contention as to leave no room to doubt that a fact is not what the plaintiff claims it to be, and if such fact is essential to the plaintiff's cause of action, the court as a matter of law must direct a verdict for the defendant. The *Lovell* court cited, *inter alia*, the decisions of this Court in *Gunning* v. *Cooley*, 281 U.S. 90, 92-94, 50 S. Ct. 231, 74 L. Ed. 720 (1930) and *Moore* v. *Chesapeake & O. Ry. Co.*, 340 U.S. 573, 71 S. Ct. 428, 95 L. Ed. 547 (1951).

D. There is no uncertainty with respect to the Erie doctrine as applied to the instant case.

Petitioner is concerned over an asserted doubt in the scope of *Erie Railroad* v. *Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). Texts, treatises, articles, cases, and discussions on the meaning and scope of *Erie* have cluttered the legal landscape, but fortunately those problems are not in view here.

Petitioner concedes that Rule 50 of the Federal Rules of Civil Procedure regulates the manner for moving for a judgment notwithstanding the verdict. That rule does not and need not express the standard for granting or denying such a motion. The standard applied by the Supreme Court of the state of Oregon is in no respect different from the standards, respectively, employed and described, and adopted, by the District Court and Court of Appeals in this case.

In our case the Oregon standards and all federal standards which have been collated are the same. Moreover, it is clear from the opinions of the courts below that the question of whose standards were to be applied was never considered, for it was never raised. Both courts below applied the same simple standard to determine whether there was probative evidence to displace mere speculation for the plaintiff-appellant-petitioner. There simply is no handle on petitioner's would-be "Federal question."

II

There is no conflict between the decisions below and the applicable law in determining whether to grant a motion for a new trial.

On this assertion petitioner does not even mention any authority. Petitioner asserted that there was a conflict among the federal courts concerning the standard to be applied on a motion for a judgment n.o.v. Petitioner cannot suggest a conflict among any federal courts on the standard to be applied in granting a new trial. Petitioner contents itself with asserting that in Oregon, under state practice and procedure, a trial court cannot weigh the evidence when determining whether to grant a motion for a new trial. Under Oregon statutory procedure a trial court certainly can grant a new trial when the evidence is insufficient to justify a verdict. O.R.S. 17.610(6).

It should be remembered that when this case was before the Court of Appeals petitioner urged that court to apply the standards of *Lind* v. *Schenley In-*

dustries, Inc., 278 F.2d 79, 90 (3rd Cir., 1960), cert. den. 364 U.S. 935, 81 S. Ct. 58, 5 L. Ed. 2d 60 (1960) and *Moist-Cold Refrigerator Co., Inc. v. Lou Johnson Co., Inc., et al*, 249 F.2d 246 (9th Cir., 1957), cert. den. 356 U.S. 968, 78 S. Ct. 1008, 2 L. Ed. 2d 1074 (1958). Both of those cases approve the federal district court's weighing of the evidence in determining whether to grant a motion for a new trial.

There is no doubt, in fact, that granting or denying new trials in the federal courts has been continuously and consistently equivalent to common law precedents and follows the practice of the federal, not state, courts. 6A *Moore's Federal Practice*, ¶59.04 [1], pp. 3711-3712. See also 6A *Moore's Federal Practice*, ¶59.08 [5], p. 3816, note 11.

Thus if a jury's verdict is against the overwhelming weight of the evidence, the federal court is required to weigh the evidence, under common law precedents and federal decisions. See *Magee* v. *General Motors Corp.*, 213 F.2d 899, 900 (3rd Cir., 1954). Petitioner asserts that the standard for determining the right to a new trial "falls within the ambit of substantive law." Petitioner cites no authority for this proposition, and there is none. Professor Moore disagrees with it:

> "The matter of new trial is closely related to the mode of trial; and has a definite impact upon the time for appeal. Many disruptive factors would be injected into federal judicial administration by making state law applicable to new trials in 'diversity' cases, and without any ap-

parent factors of merit to compensate for the disruption. *Erie-Tompkins* should be inapplicable and this principle has the support of the cases, although they do not much discuss the impact of *Erie.*" 6A *Moore's Federal Practice* ¶59.04 [1], p. 3712.

CONCLUSION

Petitioner realizes that there is no difference—in operation, statement, approach, philosophy or otherwise—between the sufficiency standard accepted by the state courts of Oregon and the standard applied by the Federal courts below to the evidence in this case.

Therefore, in order to manufacture a "Federal question" as a basis for another appellate review—in this Court—petitioner has, consciously or simply as a fugitive response to pressure, followed a devious path strewn with sophistries and without the guidance of legal authorities or factual accuracy.

Petitioner claims in this Court, for the first time, that the "Federal question" that this Court should resolve is a conflict between the various Circuits as to whether a state or a federal standard controls the quantum of evidence required for the giving or staying of a judgment n.o.v.

Petitioner must have observed at the outset that the courts below, in this case, applied the Oregon rule, which is also the federal rule. Petitioner also must have observed, if it looked, that there is no conflict

among the lower federal courts, among themselves, or with any of the procedural-substantive doctrines announced by this Court which are applicable to this case. This created a quandary for the petitioner. The quandary found its solution in, and explains, the truly lamentable scrabbling that petitioner has indulged in concerning the record of testimony and the actions of the courts below in this case.

What petitioner has attempted, in its Petition, is to inflate any colorable evidence in its favor so vastly as to create the impression that even though the courts below purported to follow the Oregon-Federal standard ("substantial evidence"), they actually did not view the quantum of evidence as generously as an Oregon state court would have done, but applied some secret Federal appraisal to it, and found it wanting. Presto, a federal question. But it isn't a federal question, or a legal question, at all. It is a question of fact —whether the evidence was "substantial," probative, credible. Petitioner's real claim is a mournful, nostalgic hope that the evidence should have been better than the courts factually found it to be. In the guise of a "federal question" the petitioner wants this Court to repeat a factual review which engrossed the courts below for over two years and left them convinced that petitioner proved no case on the facts.

And so, with a wave of the wand, the record was ignored and misinterpreted where it disagreed with petitioner. In order to elevate petitioner's raddled proof to the level of "substantial evidence," and to

defy the measured judgment of two courts and four experienced judges (who worked and studied and analyzed with tremendous care and scholarship for over two years), the petitioner lurched into the pitfall of misreading the record itself.

If the petitioner's right to a Writ of Certiorari depends on the success of petitioner's scheme here, and if the record, truly stated, exposes petitioner's effort, Certiorari should be denied. We stand on the record.

Respectfully submitted,

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